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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 80

JOSEPH SHERMAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (R. 83–95), and the *per curiam* opinion of the court of appeals *en banc* (R. 96–97), are reported at 350 F. 2d 894.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1966. The petition for a writ of certiorari was filed on March 3, 1966, and granted on April 18, 1966 (R. 98; 384 U.S. 904). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a deportation proceeding against a long-time resident the administrative factfinders must

be persuaded beyond a reasonable doubt of the truth of the charges.

2. Whether the deportation order was supported by reasonable, substantial, and probative evidence on the record as a whole.

STATEMENT

Petitioner is a sixty-year-old alien. A native of Poland, he was admitted to the United States for permanent residence in 1920 (R. 65). In March 1963 petitioner was served with an order to show cause which charged that he had last entered the United States on December 20, 1938, without being inspected as an alien, and was consequently subject to deportation under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) (R. 1–3).[1]

1. At hearings before a special inquiry officer, the government produced evidence showing that on June 8, 1937, petitioner had filled out and executed a United States Department of State "Passport Application Form For Native Citizens" in the name of Samuel Levine, stating that he intended to visit England and Poland and to depart that month (R. 5–8; Exhibit 6, Tab 9).[2] Samuel Rubinsky had

[1] Prior to 1952 a five-year statute of limitations applied to deportation for illegal entry. 39 Stat. 889. The 1952 Act eliminated all statutes of limitations. The fact that the prior law's statute of limitations would have prevented petitioner's deportation thereunder does not bar his deportation under the 1952 Act. *Lehman* v. *Carson*, 353 U.S. 685; Gordon and Rosenfield, *Immigration Law and Procedure* (1965 Rev.), § 4.6b. Petitioner does not dispute this.

[2] The exhibits introduced at the hearings are not in the printed record, but are filed with this Court as part of the certified administrative record.

accompanied petitioner and signed the passport application as an identifying witness (R. 6, 10–11). At the hearing, Rubinsky identified a photograph attached to the application as one of petitioner as he had appeared in 1937 (R. 6, 8). Based on the application, a passport was issued in the name of Samuel Levine on June 10, 1937 (R. 11–12; Exhibit 7, Tab 10). The passport contained the same picture and description of petitioner—detailed to the point of showing a scar on the back of his right hand—as the application form (R. 11–13).

"Samuel Levine" used the passport to travel aboard the SS *Aquitania* from New York to France, arriving in France on June 22, 1937 (R. 13–15). The passport was presented for inspection by French officials on arrival in France and was endorsed by American consular officers in Barcelona, Spain, in December 1938 (R. 13–16). "Samuel Levine" returned to the United States aboard the SS *Ausonia,* on a voyage originating at Le Havre on December 10, 1938, and terminating at New York on December 20, 1938 (R. 12, 16–17). His destination upon entry was 403 Chester Street, Brooklyn, New York, the address of petitioner's parents.

Travel under the passport was shown by endorsements on the passport and other documentation. The passport itself contained a French visa issued at New York on June 15, 1937; an endorsement by French officials on debarking in June 1937; an endorsement on December 2, 1938, by the American Consul in Barcelona, Spain, "valid only for direct return to the

United States"; and an endorsement by the Immigration and Naturalization Service upon return to this country in December 1938 (Exhibit 7, Tab 10). Also included in the documentary evidence were the manifest for the SS *Aquitania* for arrival in France on June 22, 1937 (Exhibit 15, Tab 17); a State Department list of United States citizens believed to have traveled to Spain to join the Loyalist forces between January 1, 1937, and September 30, 1937 (Exhibit 16, Tab 18); a State Department cablegram of December 1938 showing endorsement of "Levine's" passport in Barcelona, Spain (Exhibit 17, Tab 19); a State Department cablegram dated December 10, 1938, listing Samuel Levine's departure on the SS *Ausonia* from France (Exhibit 18, Tab 20); the manifest of the SS *Ausonia* for its arrival in New York on December 20, 1938 (Exhibit 3, Tab 7); a certificate of the Immigration Service showing Samuel Levine's arrival on the SS *Ausonia* and his destination address (Exhibit 10, Tab 13); and Selective Service records showing petitioner's parents' address as 403 Chester Street, Brooklyn, New York (Exhibit 2, Tab 6).

Edward Morrow—an American citizen who has been employed as a reporter for the New York Times since 1943 (R. 22) and who went to Spain in 1937 to fight in the Spanish Civil War for the Loyalists[3]—testified that he recognized petitioner as the person he had known in Spain as Sam Levine in 1937 and 1938 (R. 17–20, 25–26, 30–38, 62). Morrow, like

[3] At the time, Morrow was known as Edward Mroczkowski. He had his name legally changed to Edward Morrow in 1941 (R. 20–21).

Samuel Levine, went to France on the SS *Aquitania* in June 1937, passed through Barcelona, Spain, late in 1938 for repatriation to the United States and returned to the United States on the SS *Ausonia,* arriving in New York on December 20, 1938 (R. 17, 19–20, 24, 20). Morrow and "Samuel Levine" were listed in a cablegram from the American Consul in Le Havre, France, dated December 10, 1938, as two of 145 volunteers from Spain who had sailed on the SS *Ausonia* (Exhibit 18, Tab 20). Morrow stated that he had seen petitioner "at least twenty times," and remembered petitioner as a driver in a transportation unit that had given combat support to the brigade in which Morrow had medical duties (R. 28, 30–38, 62). Morrow also recognized petitioner as having been on the SS *Ausonia* on the voyage that arrived at New York from France on about December 20, 1938 (R. 19, 30). The witness conceded that the possibility existed that he was mistaken in his identification of "Levine" some twenty-five years after the event, but stated that he did not believe he was (R. 61–63).[4]

Petitioner, claiming the privilege against self-incrimination and relying primarily on cross-examination of Morrow to cast doubt on his identification

[4] The Immigration Service first communicated with Morrow in April 1963. At that interview, Morrow stated that he could not identify two photographs of petitioner as "Mr. Sherman" but that "[i]n my mind the name Levine was somewhat like the type of fellow on this photograph" (R. 25, 54–56). Morrow later viewed petitioner for about a half hour and identified him as Levine (R. 60).

testimony, elected not to testify or introduce other evidence.

2. The special inquiry officer stated in his opinion that the "Government has established with a solidarity far greater than required that [petitioner] is the person who applied for and received the United States passport in evidence * * * and that with that document he had reentered the United States December 20, 1938, claiming to be a citizen of this country named Samuel Levine" (R. 70). He ordered petitioner deported to Poland (R. 72). The Board of Immigration Appeals dismissed the appeal, holding that the government had borne its "burden of establishing that [petitioner] is deportable as charged" (R. 74). The Board found that it was established beyond reasonable doubt that petitioner had applied for the passport, giving his true description, attaching his photograph to it and stating that he was going abroad (R. 78); and that the record made it a "most unlikely hypothesis" that it was anyone other than petitioner who had received and used the passport (R. 79).

On petition for review, a panel of the court of appeals, Judge Friendly dissenting, set aside the deportation order and remanded for further proceedings, holding that in cases involving long-time residents "the Government must prove beyond a reasonable doubt the facts upon which deportation depends" (R. 83, 92; 350 F. 2d at 899).* On petition for rehearing, the court *en banc* sustained the deportation order for the reasons

* The panel agreed that the scope of review of the findings of fact is limited to whether the findings are supported by reasonable, substantial and probative evidence on the record considered as a whole (R. 87–89, 93). It distinguished, however, between

stated in Judge Friendly's earlier dissenting opinion (R. 96; 350 F. 2d at 901; see R. 93–95).

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner is an alien, now sixty years old, who was admitted to the United States for permanent residence in 1920. In 1963 the Immigration Service commenced a proceeding to deport him, charging that in 1938, after a journey abroad, petitioner had returned to this country without being inspected as an alien. It is conceded that if he made the journey he is deportable as charged.[6] But at the administrative hearing he denied the allegation, thereby precipitating an extended inquiry into this factual question. The immigration authorities found that he had made the journey in question and ordered him deported. The court of appeals *en banc* (reversing the decision of the panel that had heard the appeal) sustained the administrative findings and order. The issues before this Court involve the proper standard for factfinding in deportation cases—more particularly those involving long-time residents of this country—and its application to the facts of this case.

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judicial review of the sufficiency of the evidence and the degree of persuasion or belief required of the administrative factfinder (R. 87–89, 93). The panel found that Congress had never "adverted in any way to the problem of the degree of persuasion imposed upon the Government in deportation proceedings" (R. 89).

[6] See *Ben Huie* v. *Immigration and Naturalization Service*, 349 F. 2d 1014, 1017 (C.A. 9); *United States ex rel. Volpe* v. *Smith*, 62 F. 2d 808 (C.A. 7), affirmed, 289 U.S. 422; *Saadi* v. *Carr*, 26 F. 2d 458 (C.A. 9), certiorari denied, 278 U.S. 616.

Factfinding in the context of the administrative process typically comes at two levels, and both are involved here. First, there is the administrative finding, in which the agency determines whether the party having the burden of proof has sustained it. The burden is carried if the agency is affirmatively persuaded by the evidence.

Superimposed upon the finding of the agency or other trier of facts is judicial review of the finding. Normally the question for the reviewing court is not what it would find in a *de novo* proceeding, but whether the finding of the trier of the facts is reasonable and supported by the record. Even where the trier of the facts is required (as in a criminal case) to be persuaded of the correctness of its finding beyond a reasonable doubt, the reviewing court need not decide whether it would have made the same finding. The reviewing function is ordinarily exhausted once the court has satisfied itself of the rationality of the finding in issue.

The distinction between the factfinding responsibilities of agency and reviewing court is fundamental to this case. The panel[1] was explicit that its only quarrel with the government was over the standard to guide the administrative factfinders (R. 93). While ruling

[1] We refer to the panel of the court of appeals which initially heard petitioner's appeal and, in an opinion by Judge Waterman, Judge Friendly dissenting, set aside the deportation order. On rehearing, the court of appeals *en banc* reversed the panel and affirmed the Service on Judge Friendly's earlier dissenting opinion. Judges Waterman and Smith dissented from the *en banc* decision.

that in the case of a long-time resident like petitioner the Attorney General must be persuaded of the factual grounds of deportability beyond a reasonable doubt, the panel reaffirmed the proposition that the standard of judicial review—as the Immigration and Nationality Act expressly provides—is whether the administrative factfindings are "supported by reasonable, substantial and probative evidence on the record considered as a whole" (Section 106(a)(4), 8 U.S.C. 1105a(a)(4)); and it did not suggest that, under this standard, the findings made by the Attorney General in this case were vulnerable.

This, we believe, is also the core of petitioner's attack in this Court upon the *en banc* decision of the court of appeals. As we understand his argument, petitioner recognizes that Section 106(a)(4) adopts the familiar "substantial evidence" standard of judicial review, and argues neither that the standard is constitutionally vulnerable as applied to deportation cases nor even that a higher standard is required in deportation cases involving long-time residents (see Pet. Br. 19, 12–14). His challenge is not to the standard which the courts employ in reviewing the evidentiary sufficiency of deportation orders but to the standard of persuasion by which the Attorney General is guided in the discharge of his fact-finding function.*

* To be sure, petitioner also challenges the substantiality of the evidence to support the order in this case, but that is consistent with an acceptance of the substantial-evidence standard.

Petitioner asks this Court, if it agrees that the Attorney General is required to be persuaded beyond a reasonable doubt (or by clear, unequivocal and convincing evidence) of the essential facts supporting deportability, to appraise the facts of the present case for itself, without remanding. This request is plainly misdirected. It is the trier of the facts, not the reviewing court, that under the view of the panel (and we assume of petitioner as well) must be persuaded of the truth of the charges against petitioner. The panel so recognized in ordering the case remanded for a redetermination of the facts by the Attorney General under the new standard of persuasion that it had prescribed. The question for the reviewing court is simple: whether the administrative findings are supported by reasonable, substantial and probative evidence on the record as a whole. We show in Point II that they are. The heart of petitioner's case concerns the proper standard to guide the trier of the facts, and to that we devote Point I.

The administrative opinions in this case make clear that the Attorney General was solidly convinced, not doubtful, that petitioner had gone abroad under an assumed name in 1937. We submit that to require a higher standard of persuasion would be inconsistent with the legislative design. While it is true that the Immigration Act does not expressly advert to the degree of persuasion that the factfinder must have, it does provide that any deportation order must rest on "reasonable, substantial and probative evidence". This implies that the administrative factfinder must be reasonably persuaded on the basis of substantial and

probative evidence that the alien is in fact deportable. Any higher standard would appear excluded by the specific provision of the Act which makes the procedure there prescribed exclusive.

We stress that the Act establishes an *administrative* scheme of adjudication. It has never been thought appropriate to import into administrative proceedings the criminal standard of proof beyond a reasonable doubt or the fraud standard of clear and convincing proof. Such a result would be especially incongruous here since, as we show, the congressional purpose was actually to relax, for deportation cases, the procedural requirements of the Administrative Procedure Act. Moreover, it was well settled at the time that the relevant provisions of the Immigration Act were adopted that the Attorney General was not bound by the criminal or fraud standards. The supposition that Congress—in silence—meant to change the existing law is, in the circumstances, implausible.

Nor can resort properly be had here, as the panel thought, to the general authority of the courts to mold rules of evidence and procedure. Whatever special competence and responsibility the courts may have in prescribing such rules for judicial proceedings do not, we submit, extend to the fashioning of procedures for administrative hearings (except as may be required by due process), since in the administrative arena Congress has deliberately departed from the judicial model. As for deportation, moreover, Congress has specified the administrative procedures to be followed, and judicial prescription of a standard

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of persuasion higher than that applied by the Service in this case would, as just suggested, distort the legislative design.

Finally, the standard urged by petitioner is not required by due process. The consequences of deportation are indeed grave. But where Congress has confided the factfinding function to an expert administrative agency, and the agency is satisfied upon substantial evidence in a fair hearing that the charges are true, the requirements of due process are satisfied. The criminal standard of proof is inapposite. It is designed for a jury of laymen—not for expert factfinders—and it reflects the special character of criminal sanctions. The clear-and-convincing standard is designed for cases where a right—like citizenship—already conferred is sought to be withdrawn, generally on the ground that it was fraudulently obtained. Nothing of that sort is involved here.

I

TO ORDER THE DEPORTATION OF A LONG-TIME RESIDENT, THE ATTORNEY GENERAL MUST BE REASONABLY PERSUADED, ON THE BASIS OF REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE, OF THE FACTUAL GROUNDS OF DEPORTABILITY. A HIGHER DEGREE OF PERSUASION IS NOT REQUIRED

At the outset, it is necessary to state precisely the question to be decided here. Petitioner says it is whether in a deportation proceeding against a long-time resident of this country the facts essential to de-

portability must be proved by more than a bare preponderance of the evidence (Pet. Br. 3). But this misconceives the standard actually applied by the Attorney General in cases of this character. Mindful of this Court's reference in *Rowoldt* v. *Perfetto*, 355 U.S. 115, 120, to "the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years," the Service's special inquiry officer found in this case that the government had "established with a solidarity far greater than required"[9] that petitioner in fact journeyed abroad in 1937–1938 and re-entered this country under an assumed name (R. 70); and the Board of Immigration Appeals, reviewing *de novo* the record made before the special inquiry officer, found it to be "most unlikely" that anyone other than petitioner had made the journey (R. 79). It is thus apparent that the Attorney General was firmly persuaded of the truth of the essential allegations against petitioner. We shall demonstrate that to impose a higher degree of persuasion would conflict with the design of the Immigration Act and is not required by the Constitution.

A. CONGRESS HAS NOT ADOPTED THE STANDARD URGED BY PETITIONER

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b)—the section that prescribes the procedure to be followed by the Attorney General in deportation cases—provides that "no decision of de-

[9] Although the statute is silent on the point, it is undisputed that the burden of proving deportability is on the government.

portability shall be valid unless it is based upon reasonable, sustantial and probative evidence." The section further provides that "[t]he procedure so prescribed shall be the sole and exclusive procedure for determining" deportability. We agree that implicit in Section 242(b) is the requirement that before ordering deportation the Attorney General must be reasonably persuaded, by substantial evidence on the whole record, that the charge of deportability is true. Cf. *Morgan* v. *United States*, 298 U.S. 468, 481. Certainly an individual may not be ordered deported where, although the charge of deportability is supported by reasonable, substantial and probative evidence, on balance the administrative factfinders conclude that the evidence supporting the alien is more persuasive. But while the statute in our view requires that the administrative factfindings be based upon a reasonable conviction of their veracity, we submit that the statutory language, viewed in context, implies not adoption but rejection of the criminal standard of proof beyond a reasonable doubt or the fraud standard of clear and convincing proof.

Before Section 242(b) was enacted, the immigration laws contained no detailed provisions governing hearings in deportation cases, but made clear that the facts supporting deportability were to be determined by the Attorney General, not the courts. See, *e.g.*, *Kessler* v. *Strecker*, 307 U.S. 22, 34. In 1950, this Court held the provisions of the Administrative Procedure Act applicable to deportation proceedings. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. Congress responded by expressly exempting such proceedings

from certain requirements of the Administrative Procedure Act; it then established, in 1952 (see Section 242(b)), a self-contained and exclusive procedural system for the deportation field (*Marcello* v. *Bonds*, 349 U.S. 302).[10]

That statute provides for a hearing before a "special inquiry officer", who is an employee of the Immigration Service. The procedures are less rigorous than under the Administrative Procedure Act, but they were modeled on that Act (*Marcello*, at p. 309) and incorporate its essential features. Thus, there must be notice to the alien and an opportunity for him to be heard; the special inquiry officer is not to have participated in the investigation or prosecution of the case; and his decision of deportability must, as noted, be based upon "reasonable, substantial and probative evidence."[11] The regulations of the Attorney General establish a Board of Immigration Appeals which bears much the same relationship to the special inquiry officers as administrative agencies bear to their hearing examiners.[12]

Having thus adopted the administrative model of factfinding and having declined to "judicialize" it, even to the extent provided in the Administrative Procedure Act, Congress can hardly be thought—in silence—to have adopted for deportation proceedings

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[10] See S. Rep. No. 1137, 82d Cong., 2d Sess., p. 28; H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 55–56.

[11] The Administrative Procedure Act contains an almost identical provision. Section 7(c), 5 U.S.C. 1006(c), now codified as 5 U.S.C. 556(d).

[12] The Board has full power to redetermine factual issues. Gordon and Rosenfield, *Immigration Law and Procedure* (1966 Rev.), § 1.10e; cf. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

the stringent criminal or fraud standards of persuasion. These standards are foreign to administrative proceedings and far stricter than anything known to administrative law. It has never been suggested that either standard is imposed on federal administrative proceedings generally by the Administrative Procedure Act. *A fortiori* neither is applicable to deportation proceedings. Congress in the deportation area was unwilling even to adopt the full panoply of procedural requirements provided by the Administrative Procedure Act. Surely, then, it did not assent to the imposition of standards even higher than those prescribed by that Act.[13]

Furthermore, at the time that Section 242(b) was enacted, it was already well established that the criminal standard of proof was not applicable in the deportation field.[14] There is no basis to suppose that Congress meant to unsettle this understanding. Indeed, until the present case it was assumed without

[13] We point out that Section 349(c) of the Immigration Act, 8 U.S.C. 1481(c), provides that, whenever loss of United States nationality is put in issue, such loss must be established "by a preponderance of the evidence". This provision was enacted to reduce the government's burden from the "clear, convincing and unequivocal" standard that had been applied by this Court in *Nishikawa* v. *Dulles*, 356 U.S. 129, and *Gonzales* v. *Landon*, 350 U.S. 920 (see p. 19, n. 16, *infra*). H. Rep. No. 1086, 87th Cong., 1st Sess., pp. 40–41. Thus, in a deportation proceeding against one whose prior United States citizenship is undisputed, the government is required to prove that he performed the expatriating act only by a preponderance of the evidence. It is unlikely that Congress intended to exact a higher degree of proof where the subject of the deportation proceeding is admittedly an alien.

[14] See *United States* v. *Spector*, 343 U.S. 169, 178–179 (dissenting opinion); *Bridges* v. *Wixon*, 144 F. 2d 927, 932–933 (C.A. 9), reversed on other grounds, 326 U.S. 135; *In re*

question that Section 242(b), in requiring that deportation orders be predicated upon reasonable, substantial and probative evidence, adopted the administrative, not the fraud or criminal, standard of persuasion. Gordon and Rosenfield, *Immigration Law and Procedure* (1959), § 8.12c; Note, *Immigration and Nationality*, 66 Harv. L. Rev. 643, 698 (1953). Congress should be heard before that assumption is overturned.

It is no answer to say, as the panel below did, that the courts have inherent authority to fashion appropriate rules of evidence and trial procedure. We submit that the exercise of that authority in the present context is precluded by the congressional determination to confide decision of the facts in deportation cases to an administrative body, not a court. Congress has deliberately rejected judicial procedures for the trial of such cases, and in the fashioning of appropriate *administrative* procedures the courts do not claim particular expertise or authority.[15] Moreover, a judicial rule that conflicts with the legislative

Giacobbi, 32 F. Supp. 508, 517 (S.D. N.Y.), affirmed, 111 F. 2d 297 (C.A. 2).

[15] Cf. *Morgan* v. *United States*, 304 U.S. 1, 18; *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 359; *Florida* v. *United States*, 282 U.S. 194, 215; see, generally, Davis, *Administrative Law Treatise* (1958), § 14.01; chs. 29, 30; Jaffe, *Judicial Control of Administrative Action* (1965), chs. 9, 14, 15. The panel stated that the "realm of evidence law is one in which courts are especially expert" (R. 90). But the judicial rules of evidence are, of course, inapplicable to administrative proceedings. Gordon and Rosenfield, *supra*, § 5.10a; see, also, *Bridges* v. *Wixon*, 326 U.S. 135, 153–156, 175–176; *Yiannopoulos* v. *Robinson*, 247 F. 2d 655, 657–659 (C.A. 7); Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c), now codified as 5 U.S.C. 556(d).

scheme to which it applies cannot stand unless constitutionally required (a matter we consider next). The rule prescribed by the panel in this case is, as we have seen, opposed to the congresssional objectives in establishing an administrative system for the trial of deportation cases.

B. THE STANDARD APPLIED IN THIS CASE SATISFIES THE REQUIREMENTS OF DUE PROCESS

As pointed out earlier, both the special inquiry officer and the Board of Immigration Appeals expressed their conviction as to the truth of the essential allegation against petitioner—that he had re-entered this country in 1938 under an assumed name. The constitutional question, therefore, is whether the precepts of fair procedure embodied in the Due Process Clause of the Fifth Amendment permit a deportation order against a long-time resident to be predicated upon a reasonably entertained conviction of the administrative factfinders—based upon substantial evidence on the record of a proceeding otherwise admittedly consistent with the requirements of due process—that the alien is in fact deportable, or whether the factfinders must insist upon clear, unequivocal and convincing proof or proof beyond a reasonable doubt.

Deportation is a grave consequence, especially when visited upon an elderly individual who has spent most of his life in this country. Fairness requires, therefore, that the underlying factfindings rest upon a substantial foundation. We believe that the procedures of the Attorney General as applied in this case minimized the risk of error. The hearing was before an

expert factfinder, the special inquiry officer. The alien was accorded the full rights of the adversary process to defend himself against the government's charges. In finding against petitioner, the special inquiry officer carefully analyzed the evidence, and on the basis of his analysis declared himself persuaded that the charges had been proved. The Board of Immigration Appeals—a panel of expert factfinders—reviewed the evidence *de novo* on the record compiled before the special inquiry officer and unanimously pronounced itself likewise persuaded of the truth of the charges. Its decision was reviewable by the Attorney General, the court of appeals, and this Court.

We believe that the procedure in its totality was fair. The risk of an error adversely affecting petitioner was reduced to a minimum. Imposing upon the trier of the facts a higher degree of persuasion than was articulated by the administrative factfinders in this case is not, we submit, constitutionally required in order to guarantee fair and accurate factfinding.

Higher degrees of persuasion have been thought appropriate only in extraordinary circumstances readily distinguishable from those here. This Court has held that the standard of clear, unequivocal and convincing evidence applies in denaturalization and expatriation cases.[16] Those are cases where the government seeks

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[16] *Chaunt* v. *United States*, 364 U.S. 350; *Nowak* v. *United States*, 356 U.S. 660; *Nishikawa* v. *Dulles*, 356 U.S. 129, 135; *Maisenberg* v. *United States*, 356 U.S. 670; *Gonzales* v. *Landon*, 350 U.S. 920 (*per curiam*); *Baumgartner* v. *United States*, 322 U.S. 665; *Schneiderman* v. *United States*, 320 U.S. 118, 125, 158.

to withdraw rights of citizenship previously conferred. The Court has merely applied the settled principle of equity that vested rights can be cancelled, as fraudulently or otherwise improperly obtained, only upon an extraordinarily clear showing.[17] A principle thus designed to assure reasonable stability and finality for transactions upon which great reliance is normally placed is inapposite here. As an alien, petitioner knew that his status in this country was far more uncertain than that of a citizen, and yet he has remained for 46 years in this country without obtaining citizenship.

The criminal standard of proof beyond a reasonable doubt is likewise inapposite. The extraordinary degree of persuasion it requires reflects in part the nature of the jury as a factfinding instrument. The jury is a lay body. It traditionally does not articulate the reasoning upon which it bases its findings, and judicial review is accordingly very limited. These considerations indicate the appropriateness of insisting upon the jurors' near certainty (as well as unanimity) in criminal matters. In addition, criminal condemnation has historically been regarded as the most serious measure that society can invoke against its members, and the greatest precautions are therefore taken to ensure that errors against the defendant are not made.

Deportation hearings cannot be likened to criminal proceedings before a jury. The factfinders in deportation proceedings are experts, not laymen, and

[17] *E.g.*, *Lalone* v. *United States*, 164 U.S. 255; *Maxwell Land-Grant Case*, 121 U.S. 325.

they analyze their findings and supporting reasoning in written opinions which afford a ready basis for judicial review.[18] Furthermore, while deportation is a grave consequence, it does not carry the same stigma as criminal conviction. As this Court has repeatedly held, it is not a penal sanction.[19] The considerations that justify requiring an extraordinary degree of persuasion in criminal cases are thus absent.

We advert to a further consideration—the grave difficulties entailed by a judicial rule which singles out a particular class of aliens ("long-time" residents in this case) for special protection. Arbitrariness would seem inherent in any effort to define "long time" in this context. The judgment required to thus distinguish classes of aliens is properly legislative rather than judicial. Congress has recognized this and has provided a growing variety of forms of relief

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[18] The special inquiry officer is required by regulation to render a decision that shall include "a discussion of the evidence and findings as to deportability." 8 C.F.R. 242.18(a).

[19] *Galvan* v. *Press*, 347 U.S. 522; *Carlson* v. *Landon*, 342 U.S. 524, 537–538; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594–595; *Mahler* v. *Eby*, 264 U.S. 32, 39; *Bilokumsky* v. *Tod*, 263 U.S. 149, 154; *Bugajewitz* v. *Adams*, 228 U.S. 585; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; see, generally, Gordon and Rosenfield, *supra*, §§ 4.1c, 5.1. Whether a statute is punitive depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or incident to some broader regulatory objective. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 114, 208–209 (dissenting opinion); *Flemming* v. *Nestor*, 363 U.S. 603, 613–617; *Trop* v. *Dulles*, 356 U.S. 86, 107–109; *United States* v. *Lovett*, 328 U.S. 303, 308–312. It is clear that the provision requiring inspection of aliens upon entry to the United States is regulatory in its objective. For a comprehensive enumeration of the elements of punishment, see *Kennedy* v. *Mendoza-Martinez*, *supra*, 372 U.S. at 168–169.

from deportation for long-time residents (see 8 U.S.C. 1254, 1255, 1259)."[20] We do not disagree that the Attorney General, in weighing conflicting evidence in a deportation case, should bear in mind the hardship that an order of deportation may work in the particular case. The Attorney General did so here. The opinions in this case disclose, we believe, careful consideration of the evidence as well as a settled conviction on the basis of substantial evidence of the truth of the charges against petitioner. But we submit that any further amelioration of the hardships of deporting long-time residents is for Congress to provide.

II

UPON JUDICIAL REVIEW, THE ADMINISTRATIVE FACTFINDINGS IN A DEPORTATION CASE ARE FINAL IF SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD; THE STANDARD WAS SATISFIED HERE

We turn now to the second question in this case—whether the court of appeals *en banc* correctly concluded that the administrative findings were supported by reasonable, substantial and probative evidence on the record considered as a whole. We begin with a brief discussion of the proper standard of judicial review of administrative factfindings in deportation cases.

A. THE STANDARD OF JUDICIAL REVIEW

Until recently, there was no specific statutory provision for judicial review of deportation orders, and the only review was by habeas corpus. In the early cases the courts declined to review the sufficiency

[20] Petitioner did not seek any such relief.

of the evidence in immigration cases at all; this Court stated that "no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which [the immigration officer] acted." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660. Later, the principle was established that deportation on "charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*"; but, to uphold a deportation order, it was sufficient, in the words of Justice Stone, "that there was some evidence from which the conclusion of the administrative tribunal could be deduced" (*Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106; see, also, *Tisi* v. *Tod*, 264 U.S. 131, 133–134).[21] Some courts, however, stated the standard of review as whether the administrative order was supported by "substantial evidence",[22] an approach stimulated by the enactment in 1946 of Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(e), now codified as 5 U.S.C. 706, which provided that the findings of administrative agencies subject to the Act must be set aside if "unsupported by substantial evidence." When in 1950 this Court held the Administrative Pro-

[21] For similar formulations, see *Bridges* v. *Wixon*, 326 U.S. 135, 149, 167, 170–171, 178 (some evidence); *Kessler* v. *Strecker*, 307 U.S. 22, 34 (if there was evidence); *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 334–336 (whether there was any evidence); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 342–343 (any evidence); *Bilokumsky* v. *Tod*, 263 U.S. 149, 153 (unsupported by evidence); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (not supported by evidence).

[22] *Whitfield* v. *Hanges*, 222 Fed. 745, 749, 751 (C.A. 8); *Gambroulis* v. *Nash*, 12 F. 2d 49, 52 (C.A. 8); *Mita* v. *Bonham*, 25 F. 2d 11, 12 (C.A. 9).

cedure Act applicable to deportation cases (p. 14, *supra*), the stage was set for the enactment of Section 242(b) of the Immigration and Nationality Act of 1952—the first statute expressly to introduce the substantial-evidence standard into the immigration area.

Section 242(b) established, as observed earlier, a comprehensive administrative procedure for deportation cases modeled on the Administrative Procedure Act (see p. 15, *supra*). One of the provisions of Section 242(b) is that the regulations to be prescribed by the Attorney General for conducting proceedings before the special inquiry officer shall include the requirements that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence," and that "[t]he procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The Committee reports explain what is meant by "reasonable, substantial, and probative evidence" (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 30; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 57):

> The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below.

This definition tracks closely the Court's definition in *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, of the standard for judicial review of administrative

factfindings.[23] Hence—although the language of the committee reports, as well as the location of the provision in the section devoted to the procedure before the Attorney General, indicates that it was primarily directed to the Attorney General rather than to the reviewing courts (see pp. 13–15 *supra*)—the courts treated the provision as also establishing the standard for judicial review. Thus, they consistently held that once the findings underlying a deportation order were shown to be supported by reasonable, substantial and probative evidence, their inquiry was at an end.[24]

Following this Court's 1955 decision in *Shaughnessy* v. *Pedreiro,* 349 U.S. 48, which made available additional forms of judicial review of deportation orders under the Administrative Procedure Act, executive and legislative attention focused on the desirability of creating a single statutory review procedure. The culmination was the enactment in 1961 of Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a). Section 106(a)(4)—the first express statutory standard of judicial review—provides that:

> the petition [for review] shall be determined solely upon the administrative record upon

[23] The Court said that substantial evidence is "more than a mere scintilla"—more than evidence that does no "more than create a suspicion of the existence of the fact to be established." *Id.* at 477. It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ibid.*

[24] See, *e.g.*, *Rowoldt* v. *Perfetto*, 355 U.S. 115, 120–121; *Langhammer* v. *Hamilton*, 295 F. 2d 642, 644–645 (C.A. 1); *Lattig* v. *Pilliod*, 289 F. 2d 478, 479 (C.A. 7); *Estrada-Ojeda* v. *Del Guercio*, 252 F. 2d 904, 905 (C.A. 9); *Yiannopoulos* v. *Robinson*, 247 F. 2d 655 (C.A. 7); *Ocon* v. *Del Guercio*, 237 F. 2d 177, 180 (C.A. 9); *United States ex rel. Brzovich* v. *Holton*, 222 F. 2d 840, 842–844 (C.A. 7).

> which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.[25]

In proceedings under Section 106(a)(4), as before, the courts have considered their inquiry completed upon determining that the administrative findings are supported by reasonable, substantial and probative evidence on the record as a whole.[26]

Thus Congress has manifested its intention of confining judicial review of deportation orders within the limits that characterize judicial review of other administrative action.[27] This means that the review-

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[25] This language originated in a bill drafted in the Department of Justice. Accompanying the draft was a letter from the Attorney General explaining that the provision for judicial review was "essentially the evidentiary standard contained in Section 10(e) of the National Labor Relations Act, as amended." National Archives, Doc. 2215, S. 3169, 84th Cong.; see *Viannopoulos* v. *Robinson*, 247 F. 2d 655, 658 (C.A. 7).

[26] See *e.g.*, *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, 477, n. 6, 483–484, 486 (majority and dissenting opinions); *D'Andrea* v. *Immigration and Naturalization Service*, 335 F. 2d 377, 378 (C.A. 6), certiorari denied, 379 U.S. 999; *United States* v. *Diogo*, 320 F. 2d 898, 909, n. 9 (C.A. 2); *Greene* v. *Immigration and Naturalization Service*, 313 F. 2d 148, 151 (C.A. 9), certiorari denied, 374 U.S. 828; *Ramasauskas* v. *Flagg*, 309 F. 2d 290, 293 (C.A. 7); *Scythes* v. *Webb*, 307 F. 2d 905, 907 (C.A. 7); *Lopez-Blanco* v. *Immigration and Naturalization Service*, 302 F. 2d 553, 554–555 (C.A. 7).

[27] We do not understand petitioner to challenge this proposition or to question the constitutional validity of the congressional determination. Reverting for a moment to Point I of our argument—the degree of persuasion the administrative fact-finder in deportation cases must feel—we note the inconsistency in importing the criminal standard of persuasion in an area where Congress has so emphatically indicated that the processes of administrative law are to be applied.

ing court "is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole," by the courts of appeals (*Universal Camera, supra,* 340 U.S. at 490) and that agency findings of fact are entitled to "due deference" so long as there is substantial evidence to be found in the whole record (*Labor Board* v. *Brown Food Store,* 380 U.S. 278, 291–292). It means, too, that evidence that a reasonable mind might accept as adequate to support a conclusion may be "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620; see *Universal Camera Corp.,* at p. 488. As Professor Jaffe has summed up (*Judicial Control of Administrative Action* (1965), p. 602):

> Once [the judge] has determined that there is a reasoned probability of the fact found by the agency he is *functus officio.* It matters not that the whole record would support a contrary inference or that in the opinion of the court the contrary inference is more probable or even much more probable.

As next we show, this standard was met here.

B. THE SUBSTANTIALITY OF THE EVIDENCE

The evidence conclusively established that in June 1937 petitioner applied for a United States passport in the name of "Samuel Levine"; petitioner does not deny this. The application recited his intention to

depart, that month, for a family visit to England and Poland, and petitioner concedes that "[i]t was established that someone traveled to Europe on this passport in June 1937, aboard the SS *Acquitania,* and that someone entered the United States on this passport on December 20, 1938, aboard the SS *Ausonia"* (Pet. Br. 4). The remaining question confronting the administrative factfinders was whether petitioner was that "someone." All were convinced by the evidence that he was. The special inquiry officer found this conclusion "established with a solidarity far greater than required" (R. 70), and the Board stated, "We believe the record makes it a most unlikely hypothesis that it was one other than the [petitioner] who received and used the passport" (R. 79).

The passport itself was persuasive evidence that it was petitioner who used it. As the Board noted (R. 78), when petitioner applied for the passport he gave his true description, attached his photograph, and stated that he was going abroad. The passport itself (Exhibit 7, Tab 10) contains petitioner's description (detailed to the point of reciting a scar on the back of his right hand), his photograph, various visa and immigration endorsements indicating that the bearer had been seen and passed by foreign consular and immigration officials, and an extension endorsement by the American Consul at Barcelona dated December 2, 1938. It is more than a reasonable inference that the bearer of the passport would not have passed through immigration inspection and consular scrutiny on several occasions unless he was the person whose photograph and physical description appeared in the docu-

ment. The inference was amply corroborated by the eyewitness testimony of Mr. Morrow.

There was no reason why Morrow's uncontradicted testimony should not have been believed. As an experienced reporter for a distinguished newspaper, he could be expected to have more than ordinary facility in recalling and describing events and persons from out of the past. A cautious witness who refused to commit himself in identifying petitioner from a photograph, and who made no concrete identification until he had assured himself by personal observation of petitioner (R. 25, 54–56, 60), Morrow chose his words carefully to disclose the precise extent of his recollection. He had been in a good position to observe the events he testified to, his foreign itinerary having so closely paralleled that of "Samuel Levine", and no reason appears why he should have fabricated or exaggerated. The special inquiry officer—who observed him as a witness and was thus best situated to appraise his credibility—found him to be credible and reliable, a conclusion shared by the Board (R. 77).

The Board drew no unfavorable inference from petitioner's failure to testify, since it was based on a claim of privilege under the Fifth Amendment. But petitioner—without testifying—could readily have produced evidence establishing that he was in the United States during the crucial 1937–1938 period if such were the fact. Petitioner's whereabouts during that seventeen-months period was a matter peculiarly within his knowledge. It could have been proved by employment records, public relief records, public utility records (to name but a few possibilities), or by the

testimony of a witness who had seen him. His failure to adduce any evidence on this issue—in the face of the government's direct evidence—supports the inference that he was abroad.[28]

We submit the evidence—the passport, which petitioner admittedly obtained and which admittedly was used by someone for travel to Spain; Morrow's eyewitness testimony; the absence of any evidence that petitioner was in the country in the relevant period, evidence readily producible if petitioner had not been abroad—was indeed adequate, and that the court of appeals *en banc* properly understood and applied the statutory standard of judicial review when it could "perceive no proper basis under the statutory standard for reversing the order here under review * * *" (R. 95). This Court will disturb the court of appeals' appraisal of the substantiality of the evidence in support of administrative findings only in the "rare instance when the standard appears to have been misapprehended or grossly misapplied" (*Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 491). There is accordingly no basis for a reversal here.

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[28] See, *e.g.*, *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 225–226; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111–112; *Bilokumsky* v. *Tod*, 263 U.S. 149, 153–154.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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